APPENDIX B

[Filed June 28, 2004]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. KENNEDY, Petitioner-Appellant, v. **BILL LOCKYER,** Attorney General, State of California Respondent-Appellee.	No. 01-55246 No. CV-9-02505-BTM **PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC**

TO THE HONORABLE STEPHEN REINHARDT, DIARMUID F. O'SCANNLAIN, AND RAYMOND FISHER, CIRCUIT JUDGES:

Respondent-Appellee, Bill Lockyer, Attorney General of California, respectfully requests rehearing and suggests rehearing *en banc* of the June 14, 2004, opinion of this Court. Appendix A ("App. A") contains the slip opinion ("slip opn.") which reversed the denial of Petitioner-Appellant Robert E. Kennedy's Petition for Writ of Habeas Corpus. Fed. R. App. P. 35, 40. Rehearing is necessary because this Court departed from its typical rules of appellate practice, which resulted in a flawed and distorted understanding of the historical record and a faulty analysis that Kennedy suffered prejudice. Attorney General Lockyer has included a suggestion for rehearing *en banc*, moreover, because this Court failed to apply controlling

United States Supreme Court authority in determining the question of prejudice, which has resulted in an intra-circuit conflict with a case decided nine days after the opinion in Kennedy's matter. See *Medina v. Hornung*, No. 02-56484 (9th Cir. June 23, 2004) (citing *Mitchell v. Esparza*, 124 S. Ct. 7, 12, 157 L. Ed. 2d 263 (2003).

ARGUMENT

I.

REHEARING SHOULD BE GRANTED TO CORRECT FACTUAL MISSTATEMENTS THAT RESULTED FROM UNWARRANTED DEPARTURES FROM NORMAL RULES OF APPELLATE PRACTICE AND TO EVALUATE WHETHER THE STATE COURT'S HARMLESS ERROR DETERMINATION WAS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, UNITED STATES SUPREME COURT AUTHORITY

Kennedy's first trial in state court ended in a hung jury. Before retrial, his counsel requested transcripts of the witnesses' testimony. Kennedy later elected to represent himself and new counsel was appointed to advise him. Subsequently, the trial court ascertained that the transcribed trial testimony had been given to Kennedy and denied Kennedy's request for a more complete transcript, including motion hearings, opening statements and closing arguments. When Kennedy appealed from his conviction, the state appellate court found the trial court had "substantially complied" with the constitutional requirement to provide an indigent defendant transcripts and held that any error was harmless beyond a reasonable doubt. In concluding there was no prejudice to Kennedy, moreover, the state court found the prosecutor had successfully minimized a

witness' passing suggestion that Kennedy may have been linked to a gang. (See Excerpt of Record ("E.R.") at 7.)

A divided panel of this Court, however, granted Kennedy habeas corpus relief. Rather than accept Kennedy's argument that he was entitled to relief because the denial of a complete transcript amounted to structural error – which is how Kennedy briefed his claim in the District Court and, with the exception of one passage at the end of his reply brief, in this Court as well – the majority found Kennedy was entitled to relief under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Respectfully, however, this majority assumed facts that are contrary to the record and made faulty assumptions that resulted in a serious misapplication of the prejudice analysis.

Second, the majority committed a legal error by not granting any of the required deference to the state court's alternative holding that any error in supplying Kennedy with a complete transcript was harmless beyond a reasonable doubt. More than seven months ago, the Supreme Court made clear in *Mitchell v. Esparza*, 124 S. Ct. at 12, that a state court's finding of a harmless error should be evaluated under the deference standard of 28 U.S.C. § 2254(d). This holding was recognized by another panel of this Court in *Medina v. Hornung*, No. 02-56484 at 8382-83, nine days after the majority issued the opinion in Kennedy s case. Although the majority opinion should have cited and followed *Esparza*, this inter-circuit conflict supports resolution of the issue *en banc*.

A. Applicable Law

A petition for rehearing is appropriate where the panel's decision is based on a misunderstanding of material facts or issues in the case. Fed. R. App. P. 40(a)(2); *see e.g. United States v. Koyomejian*, 946 F.2d 1450, 1462 (9th Cir. 1991) (rehearing granted where court's opinion relied on inaccurate

facts). Rehearing *en banc* is appropriate to ensure the uniformity of decisions within this Circuit. *See* Fed. R. App. P. 35.

In *Britt v. North Carolina*, 404 U.S. 226, 227 (1971), the Supreme Court stated that, "the State must, as a matter of equal protection, provide indigent defendants **with the basic tools of an adequate defense or appeal**, when those tools are available for a price to other prisoners." This Court's jurisprudence makes it clear that *Britt* errors are subject to harmless error review. *See e.g., United States v. Rosales-Lopez*, 617 F.2d 1349, 1355-56 (9th Cir. 1980).

B. The Majority Derailed the Normal Appellate Process of Fact and Issue Development in Contravention of This Court's Recently Enacted Rules Which Resulted in a Flawed and Skewed Appreciation of the Factual Background of the Claims

Here, in the state appellate court and the district court, Kennedy contended that automatic reversal was required because the trial court refused his request for a complete transcript of his first trial despite his failure to explain why he needed additional portions of the transcript other than the trial testimony of the witnesses in order to prepare for his defense upon retrial. (E.R. at 6, 49.) Although the Certificate of Appealability issued by the district court directed Kennedy to address "whether denial of a transcript of pretrial proceedings and motions in limine was a denial of [Kennedy]'s rights and whether it was harmless error," (E.R. 76), Kennedy's opening brief failed to allege that any prejudice stemmed from the trial court's refusal to provide him with a "full" transcript and asserted that no showing was necessary because it was structural error. Attorney General Lockyer's answering brief demonstrated this claim was subject to harmless error review. Nonetheless, Kennedy did not suggest that he was in any way

prejudiced until the final sentence of his reply brief, where he only stated:

> In this case there is clearly a grave doubt whether the State courts' erroneous failure to prove Petitioner with a complete transcript of the prior mistrial that took place 7 months before the second jury trial in which Petitioner was represented by a different attorney was harmless.

(App. A - slip opn. at 7883; Kennedy's Reply Brief at 14-15.)

Kennedy's reliance below only on an argument that the failure to provide him a complete transcript was structural error (App. A - slip opn. at 7868 n.15, 7883 n.5) resulted in a lack of a factual development as to how he was prejudiced by not having a complete transcript in presenting an adequate defense at his retrial. Kennedy never has claimed to any court that he did not receive a copy of the pretrial motions in his case or that his counsel on retrial was not aware of the prior trial court's ruling that excluding any mention of Kennedy's gang involvement. Of course, if Kennedy had such knowledge, he could not have been harmed by not having a transcript of a pretrial motion hearing.

Appellate courts ordinarily will not consider matters on appeal that are not "specifically and distinctly" raised and argued in the opening brief. *T.R.W. Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *see also Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) ("Issues raised for the first time in a reply brief are waived."). However, the majority determined that, once Kennedy's structural error argument was rejected, it was obligated to conduct a harmless error analysis of the "**record as a whole**" under *Brecht*. (App. A - slip opn. at 7868 (citing *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992). The majority's decision, however, makes it unclear as to whether when, if ever, a party's failure to raise a harmless error claim under *Brecht* in a habeas corpus petition reviewed by a district

court or this Court under the AEDPA is waived. (App. A - slip opn. at 7883-84.)

Further, in *Sophanthavong v. Palmateer*, 365 F.3d 726, 737 (9th Cir. 2004), this Court noted the "obvious" prejudice wrought by allowing litigants to raise arguments for the first time in reply, where doing so deprives opposing counsel of "the opportunity to point to the record to show that the new theory lacks legal or factual support." Also, this Court has recognized the importance of allowing a party the opportunity to brief issues before any relief is granted. *See e.g.*, Circuit Rule 22-1(e). Here, such an opportunity would have allowed Respondent-Appellee to point out to the panel any misunderstanding of material facts contained in the record and would allow the panel a better assessment of the harmless error analyses by the state court and the district court. (*See* E.R. 6, 49.)

The majority's holding that Kennedy had not waived the harmless error argument and suggestion that no one could "have been prejudiced in any way by defense counsel's failure to address the prejudice question more directly," (App. A - slip opn. at 7869 n.15, 7883 n.5) resulted in the panel overlooking or misapprehending the following material points of law or facts contained in the record:

The majority's decision rests on an improper assumption that the prosecutor remained the same for both trials and, thus, had personal knowledge of all that transpired during the prior proceedings, including a ruling excluding any mention of Kennedy's gang involvement. (App. A - slip opn. at 7851, 7853.) The record, however, indicates that there were different prosecutors during the first trial, which ended in a mistrial (E.R. at 90, Court Record ("C.R.") at 11- I, Reporter's Transcript ("R.T.") at 1-123; II Clerk's Transcript ("C.T.") at 210-19), and the second proceeding where Kennedy was convicted (E.R. at

90, C.R. at 11- I, RT at 16, 19-146; II CT at 237-49). This factual error led the majority to draw an erroneous conclusion that at the retrial the prosecutor intentionally and improperly introduced evidence to show gang involvement on Kennedy's part. (*See* App. A - slip opn. at 7847, 7853.) In fact, the prosecutor on retrial tried to minimize the witness' testimony that a reference to "cuz" is used not only in reference to gang members, but also to refer to persons who work together or persons from the same neighborhood. (E.R. at 90, C.R. at 11- II RT at 40.)

The majority also states, in an issue that was never briefed, that if Kennedy's new counsel had access to a transcript of the pretrial proceedings, he would have re-raised the motion, which would likely have been granted to exclude gang references or testimony based upon the law-of-the case doctrine. (App. A - slip opn. at 7869 n.16.) Under California law, however, the law-of-the-case doctrine is inapplicable to trial court decisions but only applies to a decision of an appellate court in the same case. *See* 9 Bernard E. Witkin, *California Procedure*, § 896, pp. 930-31 (4th ed. 1997) (and cases cited therein). Accordingly, even if Kennedy's counsel had brought a motion to exclude any reference to gangs or gang testimony, the judge on retrial was not bound to follow the first judge's order.

The majority's opinion rests on an assumption that the transcript of the witnesses' testimony in the first trial would not be helpful to the defense because it was devoid of any mention of gang involvement or gang language. (App. A - slip opn. at 7851-52.) However, the record shows that the term "cuz," which arguably may intimate gang involvement, was introduced at the first trial and, presumably, was contained in the transcripts that were provided to Kennedy. (E.R. at 90, C.R. 11 - I RT at 27, 87.) Further, the record shows that when Kennedy asked the trial court if he could get "all the paperwork to the case with [first trial counsel's] notes," first trial counsel told the

court that she would be providing Kennedy not only the transcript of the witness's testimony at the first trial, but also her notes and discovery. (E.R. 90, C.R. 11 - 9/16/96 RT at 6-7.) Further, prior to retrial, Kennedy's stand-by counsel, who became his trial counsel, stated that Kennedy requested a full transcript, including all motions, opening statements and final argument so he could prepare for his next trial. The trial court responded, "He's entitled to trial testimony. All the motions were in writing, right?" (App. A - slip opn. at 7852.) This exchange indicates the trial court alerted Kennedy and his stand-by counsel that the court record contained all written motions and orders containing the court's rulings. However, there is no allegation by Kennedy that either he or his counsel on retrial did not receive these materials from Kennedy's first counsel, that they were unaware of any documents contained in the court's file which would alert them to use of "cuz" or any potential gang issue, or that the failure to have these materials somehow actually harmed Kennedy's ability to present an effective defense at his retrial.

C. The Majority Failed to Defer to the State Court's Ruling and Established a Rule That Exceeds What is Required by Supreme Court Precedent as Recognized by This Court

The Supreme Court recognized in *Britt* that an indigent defendant is entitled to some portion of the transcript to prepare for an adequate defense on retrial, but that the "outer limits of that principle are not clear." (*Britt*, 404 U.S. at 227) Distinct rulings by various circuit courts cited by both the majority and the dissent (App. A - slip opn. at 7857, 7859, 7878-79) show that *Britt* is not specific enough to dictate a certain result. Accordingly, rehearing *en banc* is required for this Court to properly determine whether an indigent defendant is always entitled not only to a transcript of all testimonial evidence, but also one containing opening and closing arguments and a

recounting of all preliminary trial motions pursuant to clearly established Supreme Court precedent.

The majority committed legal error by not deferring to the state court's conclusion that any error in supplying Kennedy with a complete transcript was harmless beyond a reasonable doubt. (E.R. at 6-7.) As previously discussed, the Supreme Court made clear in *Mitchell v. Esparza*, 124 S. Ct. at 12, that a state court's finding that an error was harmless should be evaluated under the deference standard of 28 U.S.C. § 2254(d). This holding was recognized by another panel of this Court in *Medina v. Hornung*, No. 02-56484 at 8382-83, nine days after the majority issued the opinion in this case. The majority's failure to follow *Esparza* creates an inter-circuit conflict that supports rehearing *en banc*.

Here, the majority concluded that the state appellate court's decision was "contrary to" *Britt* because it added a "substantial compliance" component to *Britt*'s requirement that "the State must provide an indigent defendant with a transcript of a prior proceeding when that transcript is **needed for an effective defense or appeal**." (App. A - slip opn. at 7863-65; *see also Britt*, 404 U.S. at 227 (emphasis added).) However, as pointed out by the dissent, the term "substantial compliance" as used by the state appellate court did not create a new component to *Britt*, but represented its reasonable conclusion that the partial transcript delivered to Kennedy satisfied *Britt*'s requirement that indigent defendants be given only those portions of a transcript which are necessary basis for a constitutionally competent defense on retrial. (App. A - Slip opn. at 7879.) Instead of the specific rule dictated by the majority that an indigent defendant is entitled to the entire transcript, including all pre-trial proceedings, *Britt* identified two factors relevant to the determination of such need: (1) the value of the transcript in connection with the appeal or trial for which it is sought, and (2)

the availability of alternative devices which would fulfill the same functions of the transcript. *Britt*, 404 U.S. at 227.

In *Yarborough v. Alvarado*, No. 02-1684, 2004 LEXIS 3834 (June 1, 2004), the Supreme Court reviewed a state court determination that a person was not in "custody" under the standard set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). In so doing, the high court more properly analyzed the question under the "unreasonable application" of clearly established law under AEDPA because the nature of its "custody"rule was more general than specific. *Yarborough v. Alvarado*, 2004 U.S. LEXIS 3834, at *23. The Court explained that a consideration of whether a state court's application of its rules was "unreasonable," requires a consideration of its specificity. The Court stated, "The more general the rule, the more leeway [state] court's have in reaching outcomes in case by case determinations." *Id.* (Citation omitted). Given *Britt*'s pronouncement that the "outer limits" of the rule that indigent defendants must be provided with"the **basic tools of an adequate defense or appeal**" are not clear (*Britt*, 404 U.S. at 227), it was not objectively unreasonable for the state appellate court to have found that affording Kennedy a free transcript of all the testimony in the prior trial was sufficient, and that his failure to articulate any specific reason for other portions of the record demonstrated that they were "not needed for an effective defense." The District Court reached the same conclusion. (App. A - slip opn. at 7882-83; see also E.R. at 6-7, 49.)

En banc review is proper to resolve an irreconcilable conflict between circuit precedents. Fed. R. App. P. 35(a)(1); *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (*en banc*). Cases in this circuit have not clearly held that a "full transcript" of a prior proceeding related to a criminal prosecution that resulted in a mistrial, must always be provided to an indigent defendant before retrial.

The majority's conclusion that Supreme Court authority, including *Britt*, clearly require that a transcript of all pre-trial as well as trial proceedings, and of the opening and closing arguments, must always be provided to an indigent defendant (App. A - slip opn. at 7857, 7859, 7877), appears to be in conflict with prior pronouncements by this court in *United States v. Rosales-Lopez*, 617 F.2d at 1356, and *United States v. Kirk*, 844 F.2d 660, 662 (9th Cir. 1988), that "the standard of reasonable necessity in the area of free transcripts remains imprecise," the "outer limits" of providing an indigent defendant with the basic tools for an adequate defense is "not clear," and the principle of providing a free transcript is not absolute. Rehearing is necessary to allow court's to conduct a meaningful harmless error analysis as a result of a denial or partial denial of an indigent defendant's request for a transcript for purposes of presenting an adequate defense upon retrial. *See United State v. Rosales-Lopez*, 617 F.2d at 1355 (this court will not reverse a conviction if the denial of a transcript request is harmless beyond a reasonable doubt); *see also* App. A - slip opn. at 7878 n.2.)

Further, insofar as the majority's decision in this case overrules established precedent by this court, rehearing *en banc* is appropriate. *See Williams-Scaife v. Department of Defense Dependent Schools*, 925 F.2d 346, 347 (9th Cir. 1991); *United States v. Aguon*, 851 F.2d 1158, 1160 (9th Cir. 1988). Accordingly, panel rehearing with a suggestion for rehearing *en banc* is appropriate in this case pursuant to Fed. R. App. P. 35 and 40.

CONCLUSION

For the foregoing reasons, Attorney General Lockyer respectfully requests rehearing by the full panel or rehearing by the *en banc* Court.

Dated: November 14, 2004.

Respectfully submitted,

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